Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

KHANG MARTIN,

Petitioner,

V.

BMW MANUFACTURING CORP.,

Respondent.

Petition For Writ Of Certiorari From The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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28 pp

QUESTIONS PRESENTED

1. Under the time period for filing a charge of discrimination with the EEOC, a claimant has 300 days when cross filing with the state agency. Does the 300-day period start when an employer has made a discriminatory decision? Or when the actual decision is enforced in the workplace?

2. Can a plaintiff recover under Title VII of Civil Rights Act of 1964, 42 U. S. C. 2000e et seq., for unlawful employment practices that are outside the statutory charge-filing period, if the practices are "sufficiently related" to unlawful practices that occurred within the period?

3. A claimant files a timely retaliatory charge with the EEOC and South Carolina Department of Wage and Child Labor. The South Carolina Department of Wage and Child Labor completed an investigation but erred on the oversight for unpaid earned wages owed. Are there any remedies for a claimant to recover these wages?

PARTIES TO THE PROCEEDING

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STATEMENT OF JURISDICTION

The opinion for the United States Court of Appeals for Fourth Circuit, not designated for publication, appears as Appendix A to this petition. A time extension motion was filed for a petition of rehearing on November 27 and denied on the same day that is Appendix B. A Motion for Rehearing and Rehearing En Banc were filed and denied on December 10 that is found at Appendix C. The opinion for the United States District Court for the District of South Carolina Greenville Division, not designated for publication, appears as Appendix D. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1) in which "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF THE CASE

From February 1995 until November 1996, Mr. Martin worked as a temporary employee within the Paintshop Maintenance group at BMW Manufacturing Corporation. BMW hired Mr. Martin, an African-American male, in December 1996 as a Team Assistant within Cost Center 1785, the Paintshop ESA group.

In February 1998, Mr. Bartow, Paintshop Manager, promoted Mr. Martin to Staff within Cost Center 1785 via a Job Opportunity System posting. Upon accepting the staff position in Cost Center 1785, Mr. Martin was continuously "double-

managed" by Mr. Scott Jones, B-shift Coordinator for Cost Center 1785, and Mr. Steve Sarratt, A-shift ESA Staff member. Mr. Martin remained in the staff position until April 12, 2000. During this period at BMW, there were no other salaried associates being managed by a peer and a supervisor. Mr. Martin's ideas were constantly questioned as well as key projects completed twice by Mr. Martin and another associate simultaneously due to lack of confidence expressed by Mr. Scott Jones and Mr. Sarratt.

At the beginning of June 1999, Mr. Hjalmar Hengstmann, Paintshop IT Coordinator, transferred to another position outside the Paintshop leaving his former position available. The position was never posted via the Job Opportunity System but filled internally. Mr. Martin was advised by Mr. Hengstmann on May 25th to verbally inquire on the position with Mr. Dara Leadford, Lead Coordinator and hiring supervisor for immediate consideration. On June 6, 1999, Mr. Martin received a phone message from Mr. Leadford stating the position responsibilities would change therefore downgrading the position to staff level. Mr. Leadford also stated the position would be filled by Mr. Robert Sincavage, current B-shift staff in the Paintshop as he was "better fit." Mr. Martin sent three mails inquiring as to the reasoning along with the educational and technical qualifications needed for the position to Mr. Leadford and Mr. Mark Poindexter, an African-American Human Resource Coordinator but to no avail.

Previously in February 1999, BMW created a new policy that stated in order to be promoted to positions in management, the associate must meet the educational and work experience requirements designated. For Mr. Hengstmann's former coordinator position, an associate would have a four-year college degree along with five years work experience in Information Technology. Mr. Martin had the all the credentials where as Mr. Sincavage had none at that particular time. (Lodging, p.17) Mr. Sincavage started the position in the middle of June 1999.

Mr. Martin was denied outside training on engineering and computer system topics by Mr. Scott Jones during period including May 1999 until April 2000 citing it was not important for his job function. However, Mr. Mike Smith a white staff member was allowed to attend Windows NT Administration training and other courses.

In August 1999, Mr. Martin immediately admitted to an unprofessional act within the workplace. This act was the only below standard blemish on his employment record. However, Mr. Martin was accused of poor communication and work ethic from the period June 1999 – April 2000.

From August 1999 until April 2000, Mr. Martin continuously worked in a hostile environment initiated by Paintshop management in retaliation against him for his involvement in an unprofessional act.

On September 28,1999, Mr. Martin attended a restructuring meeting for Cost Center 1785 headed by Mr. Doug Bartow and Mr. Steve Jones, Lead Coordinator of Engineering and Maintenance for Paintshop. A decision was made that Mr. Kevin Latham; B-shift staff member within Cost Center 1785 would transfer to A-shift. Mr. Martin along with Coordinator Mr. Scott Jones was to remain as management personnel within Cost Center 1785 for B-shift. Mr. Martin asked Mr. Bartow what were measures could be utilized in transferring to A-shift i.e. Mr. Sammy Rice's position within the cost center. Mr. Bartow's response was that Mr. Martin would have to apply through the Job Opportunity System for the position. (Lodging, p. 17) However, it was in stark contrast to previous B-shift to A-shift moves by Mr. Steve Sarrat and Mr. Craig Barnwell who were both white and did not apply when the A-shift position was available.

On September 29, 1999, Mr. Martin submitted an email addressing concerns and questions from the previous days meeting.

On September 30, 1999, Mr. Bartow and Mr. Martin engaged in a closed-door meeting to address the email. Mr. Bartow verbally threatened Mr. Martin for sending the email. Mr. Bartow went onto state if continued questions persisted, it would lead to a shortened career at BMW. Mr. Martin's emailed questions were never answered.

In December 1999, Mr. Sarratt accused Mr. Martin for taking system privileges away from himself and ESA associate, Mr. Huynh Phan. Mr. Sarratt changed Mr. Martin's system privileges and password. In a meeting involving Mr. Sarratt, Mr. Mike Robinson, Mr. Scott Jones and Mr. Martin, Mr. Martin stated that he did not tamper with their respective accounts and offered an observation that software has an error.

On another occasion, Mr. Sarratt accused Mr. Martin of corrupting the software due to the fact Mr. Martin checked Mr. Sarratt's actions as new system administrator and made a change to the Alarm Configuration section of the software.

On January 5, 2000, Mr. Sarratt accused Mr. Martin of sabotaging the system during the Christmas shutdown. Mr. Sarratt did not load the system backup properly to correct the problem that occurred on the Facilities Monitoring Computer System.

On January 27, 2000, Mr. Martin was involved in a suspension meeting with Mr. Mark Poindexter, Mr. Bartow and Mr. Steve Jones on the basis of sabotage to the Facilities Monitoring Computer System and responsive emails to Mr. Steve Sarratt. Mr. Martin stated through a detailed explanation that there was a software problem within the system but his explanation was ignored. The suspension was immediate pending an investigation by Mr. Poindexter.

On February 1, 2000, Mr. Martin was involved in an employment reinstatement meeting with Mr. Poindexter, Mr.

Bartow and Mr. Jones. Mr. Poindexter stated Mr. Martin had his employment reinstated. Mr. Poindexter handed a document to sign and hurried him to sign it in lieu of reading the document in its entirety. Mr. Poindexter informed Mr. Martin of a Cost Center 1785 management meeting the following morning. Mr. Poindexter did not inform the actions surrounding a third level corrective action.

On February 2, 2000, Mr. Martin was involved in a meeting with Mr. Poindexter, Mr. Bartow, Mr. Steve Jones, Mr. Scott Jones, Mr. Steve Sarratt and Mr. Mike Robinson to discuss the failures of communications within Cost Center 1785 as it pertained to the previous suspension. Mr. Bartow made Mr. Martin the scapegoat for miscommunication within the management team of Cost Center 1785.

On February 7, 2000, Mr. Martin submitted an email to Mr. Poindexter requesting a meeting to discuss his investigative report along with all findings around the system sabotage. Mr. Poindexter did not respond. Mr. Martin immediately moved to Mr. Larry Staton, Human Resource Manager for a response and was promised an answer within five business days but to no avail. Mr. Martin resubmitted the request to Mr. Poindexter on April 10, 2000 and received a response to a meeting set for April 14, 2000 but was terminated on April 12, 2000.

During his tenure as staff in Cost Center 1785, Mr. Martin was never allowed to exercise a management role over the B-Shift Equipment Service Associates when Mr. Scott

Jones, Coordinator, was out for vacation or illness. Instead, all white staff members and Mr. Mike Robinson, A-Shift Coordinator, within this cost center would manage the B-shift in Mr. Jones' absence.

Mr. Martin was consistently harassed via emails and verbally from February 2000 until termination by Mr. Sarratt on Facilities Monitoring Computer System stability. Mr. Scott Jones denied the generation for new projects during this period. Mr. Martin was unable to receive assistance from Mr. Poindexter and Ms. Callahan, Human Resource Coordinators on investigation report results from January 2000 suspension, unexplained seizing of vacation days, wage shortages and safety shoe reimbursement.

Mr. Martin conducted himself professionally in the year 2000 and completed all assigned tasks by Mr. Scott Jones to the letter. Mr. Jones attacked Mr. Martin personally in his yearly review in April 2000.

On April 17, 2000, Mr. Martin filed a complaint with EEOC and South Carolina Human Affairs Commission citing BMW for unlawful employment acts of discrimination based on his race.

On April 26, 2000, Mr. Martin was given a biased management review due to the fact he filed an EEOC complaint and all pertinent information was not submitted by Human Resource Department.

On May 18, 2000, Mr. Martin filed a retaliation charge against BMW for failure to timely pay earned wages in accordance to the company and state policies.

In November 2000, South Carolina Department of Wage and Child Labor Commission cited BMW for improper timely wage payment to Mr. Martin in case 37-87-01. At this time not all earned wages and reimbursements have been received.

ARGUMENT

Mr. Martin asserts in this case that BMW Manufacturing Corp. continuously committed unlawful employment acts of overt and covert discrimination, retaliation and creation of a hostile work environment against him on the basis of race during his employment period. Support for this position comes directly from the Civil Rights Act of 1964. Section 706(e) states that a potential plaintiff shall file any charge with the EEOC within 180 or 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e – 5(e). When an unlawful employment practice continues into the charge-filing period, the plaintiff may seek redress for that violation, without regard to when the plaintiff knew or should have known of the practice.

Mr. Martin's discrimination claim for promotion denial in June 1999 was noted as time barred on the basis the action took place outside the 300-day period in which the initial action

for several reasons. Mr. Martin's initial assumption was based on an educated speculation but was proven with supporting memorandum thru initial discovery that occurred in December 2000.

Utilizing the plain language established thru Job Function Data Sheet, BMW asserts that all salaried positions must have in order to specify respective primary functions (Lodging, p.5) The only difference between Mr. Hengstmann's JFDS and Mr. Sincavage's JFDS is the education and work experience requirement. (Lodging, pp.6-9) Mr. Martin had all qualifications to fulfill the position requirements from the BS degree in Computer Information Systems to eight years professional experience prior to BMW and in his current position. (Lodging, pp.10-11, 16) The position was given to an under qualified white staff member. (Lodging, pp.14-15) Due to the denial for the promotion, Mr. Martin, an African-American was unable to gain a $12, 000 base salary increase along with the most substantial benefits being a free company car and A-shift working hours for becoming a Coordinator replacing Mr. Hengstmann as opposed to his current level of B-shift staff. The prima facie case has been concretely established and satisfied in regards to McDonnell Douglas, 411 U.S. at 802; (1973) BMW moved Mr. Sincavage into the downgraded staff position in the middle of June 1999. He was officially acknowledged into the position by signing the JFDS on August 7, 2000. (Lodging, p.15) This unlawful action was continuously repeated everyday

as Mr. Sincavage reported to work in the downgraded position before August 7, 2000 thus the 300 day count moves forward as it resembles a nuisance tort. This point is thoroughly supported on the continuing violation doctrine in which the Ninth Circuit said, "allows courts to consider conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice.'" (Quoting Anderson v. Reno, 190 F.3d 930, 936 (9th Cir. 1999)). In the Fifth Circuit in Berry v. Board of Supervisors of L.S.U., 715 F.2d 971 (1983), the Court deemed factors relevant that a Title VII plaintiff may recover for an occurrence outside the limitations period. Utilizing the most important factor of whether the act had a "degree of permanence" that should have put the plaintiff on notice of his claim. 715 F.2d at 981. In this case, the degree of permanence for Mr. Martin's promotional denial was the degree of racial animus it exemplified that was deeply embedded in the Paintshop management structure.

In contrast to Proud v Stone, 945 F.2d 796 (4th Cir. 1991), Mr. Bartow hired Mr. Martin after 21 months as a temporary employee and promoted him February 1998 to staff in Cost Center 1785. Mr. Bartow is guilty of initiating all unlawful practices, which are encompassed in this case. Mr. Bartow testified in an affidavit for summary judgment the primary job functions were to change however that was not the case. (Lodging, p. 2 Section 4) He continued to exemplify his lack of responsibility by creating a hostile work environment

thru the immediate retaliation towards Mr. Martin for inquiring questions about Cost Center 1785 reorganization. (Lodging, p.3) Mr. Martin would still be an employee today if he were not discriminated against in June 1999.

Being officially separated from the organization on April 12, 2000, BMW under the South Carolina Payment of Wage Law 41-10-50 must pay all earned wages within 48 hours or next regular pay period not exceeding 30 days. (Lodging, p.18; Appendix E, APP. 10) Mr. Martin worked on April 5, 2000 from 8:10pm until 5:00 am with a total work time of eight hours and ten minutes that includes a forty-minute non-paid lunch. He was only paid for eight hours. On April 11, 2000, Mr. Martin worked from 7:37 pm to 7:00 am for a total work time of ten hours and forty-three minutes. He was only paid for eight hours and forty-three minutes. (Lodging, p.19) BMW is in direct violation of their own policy as well as state statute by not paying all unused vacation and earned wages in the amount of two hours and fifty-three minutes by May 12, 2000. (Lodging, pp. 19-22)

The South Carolina Department of Wage and Child Labor erred on both counts and was not fined in properly. In accordance to 41-10-80 © the plaintiff may seek in a civil action to recover an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees that are allowed by the court. (Appendix E, p.11) Mr. Martin filed a complaint for the recovery for earned wages owed and

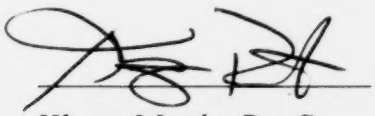
other unlawful employment practices on January 28, 2001 with case number 6:01-0259-25AK in US District Court Greenville Division.

CONCLUSION

In light of the foregoing, the United States Supreme Court should issue a writ of certiorari to the Court of Appeals for the Fourth Circuit and consider petitioner's argument that his discrimination and retaliation claims have merit and were denied by the ruling of the lower courts.

Respectfully submitted,

Dated this 9th day of February, 2003



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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 02-1942

KHANG MARTIN,

Plaintiff – Appellant,

Versus

BMW MANUFACTURING CORPORATION,

Defendant – Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville.
Terry L. Wooten, District Judge. (CA-01-259-6-25AK)

Submitted: November 7, 2002 Decided: November 13, 2002

Before WILKINS and LUTTIG, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Khang Martin, Appellant Pro Se. Robert M. Sneed, George Andrew Harper, JACKSON, LEWIS, SCHNITZLER & KRUPMAN, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Khang Martin seeks to appeal the district court's order dismissing his civil action alleging employment discrimination. We dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed.

Parties are accorded thirty days after the entry of the district court's final judgment or order to note an appeal, Fed. R. App. P. 4(a) (1) (A), unless the district court extends the appeal period under Fed. R. App. P. 4 (a) (5) or reopens the appeal period under Fed. R. App. P. 4(a) (6). This appeal period is "mandatory and jurisdictional." Browder v. Director, Dep't of Corr., 434 U.S. 257, 264 (1978) (quoting United States v. Robinson, 361 U.S. 220, 229 (1960)).

The district court's order was entered on the docket on July 16, 2002. The notice of appeal was filed on August 16, 2002. Because Martin failed to file a timely notice of appeal or to obtain an extension or reopening of the appeal period, we dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented

in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED

November 27, 2002

No. 02-1942

CA-01-259-6-25AK

KHANG MARTIN

Plaintiff – Appellant

v.

BMW MANUFACTURING CORPORATION

Defendant – Appellee

ORDER

Appellant has filed a motion for extension of time in which to file a petition for rehearing.

The Court denies the motion.

For the Court – By Direction

/s/ Patricia S. Connor

CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED

December 10, 2002

No. 02-1942

CA-01-259-6-25AK

KHANG MARTIN

Plaintiff – Appellant

v.

BMW MANUFACTURING CORPORATION

Defendant – Appellee

ORDER

Appellant has filed an petition for rehearing and rehearing en banc. This Court strictly enforces the time limits for filing petitions for rehearing and rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc as untimely filed.

For the Court – By Direction

/s/ Patricia S. Connor

CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

KHANG MARTIN, Case No.: No. 6:01-0259-25AK

Plaintiff,

vs.

BMW MANUFACTURING CORP.,

Defendant

In this pro se employment discrimination case, the plaintiff alleges that the defendant unlawfully discriminated against him on account of his race. Specifically the plaintiff alleges that the defendant unlawfully: denied him a transfer to "A-shift;" denied him both a promotion to another position and training opportunities; "double -managed" him; and terminated him because of his race. The defendant has filed a motion for summary judgment. (Doc. #26).

This matter is now before the undersigned for review of the Report and Recommendation ("the Report") filed by United States Magistrate Judge William M Catoe, to whom this case had previously been assigned pursuant to 28 U.S.C. § 636(b) and Local Rule 73.02(B)(2) (D.S.C.). In his Report, Magistrate Judge Catoe recommends that the defendant's motion for summary judgment be granted. Plaintiff has filed objections to the Report.

> In conducting this review, the Court applies the following standard:
>
> The magistrate judge makes only a recommendation to the court, to which any party may file written objections... The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a de novo determination of those portions of the report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the Report and Recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case, the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. of the City of Columbia, 791 F.Supp. 137, 138 (D.S.C. 1992) (citations omitted). In light of this standard, the Court has reviewed, de novo, the Report and the objections thereto. The Court accepts the Report in its entirety and concludes that the plaintiff's objections thereto are without adequate legal justification.

THEREFORE, IT IS HERBY ORDERED that the Report be **ACCEPTED**, plaintiff's objections be

OVERRULED, and the defendants' motion for summary judgment be **GRANTED**. (Doc. #26).

IT IS SO ORDERED.

/s/ Terry L. Wooten

UNITED STATES DISTRICT JUDGE

July 11, 2002

Florence, South Carolina

APPENDIX E

Title 41 - Labor and Employment

CHAPTER 10.

PAYMENT OF WAGES

SECTION 41-10-30. Notification to employees of wages and hours agreed upon; recordkeeping requirements; requirement of itemized statement of gross pay and deductions for each pay period.

(A) Every employer shall notify each employee in writing at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, and the deductions which will be made from the wages, including payments to insurance programs. The employer has the option of giving written notification by posting the terms conspicuously at or near the place of work. Any changes in these terms must be made in writing at least seven calendar days before they become effective. This section does not apply to wage increases.

(B) Every employer shall keep records of names and addresses of all employees and of wages paid each payday and deductions made for three years.

(C) Every employer shall furnish each employee with an itemized statement showing his gross pay and the deductions made from his wages for each pay period.

SECTION 41-10-40. Medium of payment; deposit of wages to employee's credit; prohibition against deductions in absence of written notice; time and place of payment.

(A) Every employer in the State shall pay all wages due in lawful United States money or by negotiable warrant or check bearing even date with the payday.

(B) An employer may deposit all wages due to the employee's credit at a financial institution which is doing business in the State and is insured by an agency of the federal government. When an employee's wages are paid by deposit at a financial institution, he must be furnished a statement of earnings and withholdings. Any wage deposit plan adopted by an employer shall entitle each employee to at least one withdrawal for each deposit, free of any service charge.

(C) An employer shall not withhold or divert any portion of an employee's wages unless the employer is required or permitted to do so by state or federal law or the employer has given written notification to the employee of the amount and terms of the deductions as required by subsection (A) of Section 41-10-30.

(D) Every employer in the State shall pay all wages due at the time and place designated as required by subsection (A) of Section 41-10-30.

SECTION 41-10-50. Payment of wages due discharged employees. When an employer separates an employee from the payroll for any reason, the employer shall pay all wages due to the employee within forty-eight hours of the time of separation or the next regular payday which may not exceed thirty days.

SECTION 41-10-80. Violations and penalties; civil actions by employees; administrative review of civil penalties.

(A) Any employer who violates the provisions of Section 41-10-30 must be given a written warning by the Director of the Department of Labor, Licensing, and Regulation or his designee for the first offense and must be assessed a civil penalty of not more than one hundred dollars for each subsequent offense.

(B) Any employer who violates the provisions of Section 41-10-40 must be assessed a civil penalty of not more than one hundred dollars for each violation. Each failure to pay constitutes a separate offense.

(C) In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow. Any civil action for the recovery of wages must be commenced within three years after the wages become due.

(D) The Director of the Department of Labor, Licensing, and Regulation or his designee shall promulgate regulations to establish a procedure for administrative review of any civil penalty assessed by the commissioner.